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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

March 5, 2015

10:03 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

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2 (CC: Doc. no. 7929) Pre-Trial Conference by Telephone.

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RESIDENTIAL CAPITAL, LLC, et al.

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1 P R O C E E D I N G S

2 THE COURT: All right. This is Judge Glenn. We're on
3 the record in Residential Capital, number 12-12020. This is
4 the final pre-trial conference with respect to the claim of
5 Barry Mack.

6 May I have the appearances, please?

7 MR. GARBER: David Garber on behalf of the claimants,
8 Mack.

9 MR. LEWIS: Good morning, Your Honor. Adam Lewis or
10 Morrison & Foerster, and Kristin Hiensch, of Morrison &
11 Foerster for the ResCap Borrower Claims Trust.

12 THE COURT: Thank you very much, both of you. And
13 you're fortunate not to be New York today.

14 MR. LEWIS: So I understand.

15 MR. GARBER: Yeah.

16 THE COURT: I'm just trying to log on to my computer
17 at my desk, so just hang on for a minute.

18 Once again, we have a snowy day in New York, as you
19 probably have heard.

20 MR. GARBER: I was just telling Mr. Lewis that we're
21 kind of oppressed by a heat wave, which is a little unusual for
22 this time of year in Florida.

23 THE COURT: Where in Florida are you, Mr. Garber?

24 MR. GARBER: I'm in Naples. That's the southernmost
25 point on the west coast that has a city. We're right across

1 from Miami.

2 THE COURT: Okay. No, I've been to Naples before. I
3 once attended some kind of conference at the Ritz Carlton in
4 Naples. It was very nice.

5 MR. GARBER: Oh yeah, it's a very nice for
6 conferences.

7 THE COURT: Yeah.

8 Okay. All right. So I've reviewed the proposed joint
9 pre-trial order, and my questions relate to some of the
10 exhibits and actually some of the objections. I think that I'm
11 certainly satisfied with the joint pre-trial order. One
12 concern I have with -- we'll talk through some of the exhibits.

13 Mr. Garber, with the deposition designations, you
14 didn't designate page and line numbers. I don't permit entire
15 deposition transcripts to be dumped into evidence. I require
16 specific designations of page and line numbers. Mr. Lewis has
17 objected to some of the depositions -- we'll talk about that --
18 without knowing precisely what page and line numbers you're
19 proposing. It's not satisfactory to me, and it doesn't really
20 give Mr. Lewis an opportunity to object to specific portions of
21 it.

22 Mr. Lewis, on the other hand, with respect to
23 depositions, did designate specific page and line numbers.
24 When I look at pages 18 and 19 of the pre-trial conference
25 order, for example, Exhibits V and W, Mr. Lewis has designated

1 specific page and line references. That's the way it's
2 supposed to be done, and I thought I had made that clear at one
3 of the prior hearings. If I didn't, I am now.

4 So what you need to do is to provide Mr. Lewis and the
5 Court with your specific designations.

6 MR. GARBER: Your Honor, may I address that for a
7 minute?

8 THE COURT: Yes, certainly. Go ahead.

9 MR. GARBER: Most of the depositions that I have
10 listed will not be -- I don't plan to put them into evidence.
11 They are available for rebuttal or for impeachment of
12 witnesses. I understand GM is going to have a witness. So I
13 don't really think that we will be introducing anything --

14 THE COURT: Okay.

15 MR. GARBER: -- other than for those cases. And I'm
16 not sure that's what the pre-trial order addressed. But I sent
17 them up in abundance of caution.

18 THE COURT: Okay.

19 MR. GARBER: The only exception to that would be, we
20 would want to introduce the entire deposition of Mrs. Mack, who
21 was taken by videotape, in, I believe, April of 2012. And it's
22 very difficult for me to sort through that and say only two
23 pages or six lines or something like that. I think it needs to
24 come in in its entirety.

25 Mr. Mack's deposition, which was also videotaped, I'm

1 not sure that we will need to do that since I anticipate he'll
2 be at trial. I guess I have it available.

3 Other than those two depositions, I don't plan to
4 introduce anything except as rebuttal.

5 THE COURT: Well, let me ask you. You designated the
6 depositions of Juan Antonio Aguirre and Renaldo Reyes. Are
7 you --

8 MR. GARBER: Yes, Your Honor.

9 THE COURT: You're telling me that you do not intend
10 to offer any portions of those depositions?

11 MR. GARBER: No, I do not intend to offer them in my
12 case-in-chief. But depending on how the defense goes, I may
13 refer to portions of them.

14 THE COURT: Okay, all right.

15 Do you want to respond to that, Mr. Lewis?

16 MR. LEWIS: Yes, Your Honor. I will address the
17 question of Mrs. Mack's deposition. It sounds like the other
18 depositions are nonissues for the moment.

19 THE COURT: Go ahead.

20 MR. LEWIS: Mrs. Mack's deposition is, at bottom,
21 hearsay, because she won't be present. And while there are
22 exceptions to the hearsay rule, I don't think any of them apply
23 here. And I, of course, have never had a chance to examine
24 her. Mr. Smith T did, but the scope of the examination that he
25 was permitted to do was quite limited, because the only issue

1 that was up for trial at that time -- this was the trial on the
2 motion to vacate the judgment -- was excusable neglect. And
3 there's a passage in the trial transcript itself, in which Mr.
4 Garber is beginning to ask questions -- much broader questions
5 of Mrs. Mack.

6 Mr. Smith T objects, saying, Your Honor, I didn't have
7 a chance to examine on this because I was told the scope was
8 limited, and so I don't think Mr. Garber should be able to do
9 that. And the Court agreed with him -- with Mr. Smith T.

10 The second important point here about her former
11 deposition is that the motive for examination, even if you
12 assume that Deutsche Bank, which was the party then -- is the
13 predecessor-in-interest, according to one of the exceptions for
14 the hearsay rule, it didn't have the same motive or
15 opportunity, for examination because, at that time, the 2605(e)
16 issue wasn't before the Court or the parties. It didn't come
17 into the proceeding. This deposition was taken in April 2012;
18 the trial on the motion to vacate was in late April of 2012.
19 And Mr. Mack and Mr. Garber first introduced the 2605 issue in
20 a brief filed in connection with post-trial proceedings in
21 November of 2012. So at that time of the deposition and,
22 indeed, of that trial, Deutsche Bank didn't have the same
23 motive or opportunity to inquire of Mrs. Mack as would be
24 relevant here, where the issue is not a foreclosure, but the
25 2605 question, only.

1 And as a consequence, I think the deposition is,
2 itself, hearsay in its entirety. In any case, I would still
3 want to reserve the right to object to specific passages. This
4 kind of ties into another issue that, perhaps, we will discuss
5 later, which is the scope of the trial. It's my impression
6 that Mr. Garber is, in essence, content to retry the whole
7 foreclosure issue. And that is a much broader subject matter
8 than is before the Court on this occasion.

9 MR. GARBER: Your Honor, may I respond?

10 THE COURT: Yes, go ahead.

11 MR. GARBER: I don't agree with most of what Mr. Lewis
12 said because of this: there were two depositions of Mrs. Mack.
13 And I'm going by memory, but I think it's pretty good. She had
14 her deposition taken in the fall of 2011. And the issue before
15 the Court -- by the way, GMAC made an appearance; Mr. Smith T
16 represented them, and Deutsche Bank was not only presented by
17 Smith T, but another attorney. And the scope of that
18 particular deposition was as exactly as Mr. Lewis has described
19 to you. However, as the proceedings progressed, it became
20 evident that, at some future point, GMAC may be directly a
21 party of suit.

22 And so we asked leave of Court to take a deposition of
23 preservation, which is allowed under the Rules in the State of
24 Florida. And so we took the deposition of Mr. and Mrs. Mack at
25 their home of New Jersey. I made it then in April of 2012, at

1 which time -- and it's on the record -- that I told Mr. Smith T
2 that, in fact, there were no restrictions on him. He could ask
3 anything at all, and that we anticipated there would be
4 possibly be a future suit. And I enumerated the grounds on
5 which that suit would go, which were the same grounds, I think,
6 that we put in our claim with bankruptcy court.

7 So Mr. Smith T had ample opportunity to question Mr.
8 and Mrs. Mack on every single issue, and I think he did do
9 that. I also questioned of her on every single issue, that was
10 damages, causation, everything else.

11 And so I think that it is not hearsay. It was
12 preservation of testimony as allowed by the record, and it is a
13 party to the lawsuit, their evidence, with the opposite side
14 being present and having the right to cross-examine.

15 THE COURT: Well, Mr. Garber, let me ask this, because
16 that transcript is dated April 4th, 2012. Had Mr. Smith T
17 appeared -- had GMAC appeared in the action prior to April 4th,
18 2012?

19 MR. GARBER: Yes, Your Honor, they appeared very early
20 on in the proceedings.

21 THE COURT: Okay. All right. I'm going to overrule
22 the objection to the admission of the Cheryl Mack deposition
23 taken on April 4th, 2012, and that's without prejudice to Mr.
24 Lewis' -- if he has an objection to specific questions and
25 answers within the transcript, I'll permit you to do that. The

1 objection you made at this point is overruled, Mr. Lewis, but I
2 think we'll talk about -- I want you to -- I'll give you a
3 deadline when we finish for objecting to specific page and line
4 numbers, if you wish, and you'll do that in writing. And we'll
5 give Mr. Garber a chance to respond to that. But as to the
6 general objection to Mrs. Mack's deposition, that's overruled.

7 The Court is relying on Federal Rule of Evidence
8 804(a)(4). She obviously can't be present because of death.

9 And Mr. Lewis, if you dispute whether Mr. Smith T --
10 whether GMAC had appeared in the action prior to the April 4th,
11 2012 deposition, you can certainly make a record of that. My
12 recollection --

13 MR. LEWIS: Thank you, Your Honor.

14 THE COURT: -- and I don't have papers in front of me,
15 but I certainly -- my recollection of the history of the
16 Florida proceeding was that GMAC did appear once -- when
17 Deutsche Bank was seeking to have the default set aside. But
18 I'll give you -- I'm not ruling based on my memory. That is my
19 memory from it, but I'll certainly give you a chance.

20 Do you contest that issue, Mr. Lewis?

21 MR. LEWIS: Your Honor, let me tell you what I do
22 know, and the short answer is I don't know the answer to that
23 question.

24 THE COURT: Okay.

25 MR. LEWIS: I do know that if you read the transcript

1 of the trial itself, which was in late April -- April 26th, I
2 think it was, of 2012 -- it shows Mr. Smith T appearing on
3 behalf of Deutsche Bank as well. Whether he appeared on behalf
4 of Deutsche Bank in the deposition, I don't know. It doesn't
5 say so on the cover page.

6 THE COURT: Not the issue of did he --

7 MR. LEWIS: I will --

8 THE COURT: -- appear for Deutsche Bank. The question
9 is --

10 MR. LEWIS: -- I --

11 THE COURT: -- was -- had --

12 MR. LEWIS: I'm sorry; not Deutsche, GMAC.

13 THE COURT: Yes.

14 MR. LEWIS: Forgive me, Your Honor.

15 THE COURT: Yes.

16 MR. LEWIS: I will simply inquire of Mr. Smith T, and
17 he will tell me what he thinks, and he will cite to me what he
18 thinks the record is. And then I will make a decision whether
19 to present that to the --

20 THE COURT: Okay.

21 MR. LEWIS: -- Court.

22 THE COURT: All right.

23 MR. LEWIS: It seems to me to make the most -- is the
24 Court also overruling the objection on the grounds that there
25 was not the same motive, because the 2605(e) issue had not been

1 introduced yet?

2 THE COURT: I'm overruling --

3 MR. LEWIS: Because that's -- there's no question
4 about that.

5 THE COURT: I'm overruling your objection to the
6 admission of Mrs. Mack's --

7 MR. LEWIS: Okay.

8 THE COURT: -- deposition. I'm going to leave it at
9 that.

10 MR. LEWIS: Very well, Your Honor. Thank you.

11 THE COURT: All right.

12 And just to be clear, Mr. Garber, you're not offering
13 as part of your case-in-chief either the Barry Mack deposition,
14 the Juan Antonio Aguirre or Renaldo Reyes depositions. Am I
15 correct?

16 MR. GARBER: That's correct, Your Honor.

17 THE COURT: All right.

18 Now, did Ms. Conrad (ph.) ever get deposed?

19 MR. GARBER: To -- no, she was not deposed, so that
20 won't be an issue.

21 THE COURT: Okay. All right.

22 MR. LEWIS: Your Honor, maybe I can just get Mr.
23 Garber to confirm that also means she will not be a witness?

24 MR. GARBER: I don't think she will be a witness. We
25 still have a subpoena out for her, but she's been dodging it.

1 And I don't think we're going to see anything more of Ms.
2 Conrad.

3 MR. LEWIS: Okay, thank you.

4 THE COURT: All right. Let me go over the objections
5 that have been asserted to exhibits. Mr. Lewis, you marked as
6 Exhibit J a January 4th, 2012 letter from Mr. Garber to Mr.
7 Smith T with enclosures. What is -- Mr. Garber, what is your
8 objection to that?

9 MR. GARBER: That's my letter of January 4th, 2012 to
10 Smith T. The reason I object is, A, it's hearsay. It's a
11 cover letter. I don't object to the contents of it, which had
12 copies of letters that my client had provided. But my
13 impressions or thoughts or whatever are not at issue in this
14 matter.

15 THE COURT: All right. So the attachments to the
16 letter, you're not objecting to?

17 MR. GARBER: Yes, Your Honor, I'm not objecting to the
18 attachments.

19 THE COURT: Mr. Lewis, does that resolve your -- I
20 mean, I --

21 MR. LEWIS: Well, it does and it doesn't.

22 THE COURT: -- the cover --

23 MR. GARBER: I mean --

24 THE COURT: -- the letter -- the transmittal letter is
25 that: it's a transmittal letter.

1 MR. LEWIS: Yeah, the timing may be important, and
2 that's why I included it. And I don't think it's hearsay
3 because it's an authorized admission. I don't think it even
4 counts as hearsay under the Federal Rules because Mr. Garber is
5 their authorized representative --

6 THE COURT: Okay.

7 MR. LEWIS: -- in the litigation.

8 THE COURT: All right. The objection's overruled.

9 All right. Exhibit P, as in Paul, is Mr. Garber's
10 November 18th, 2014 letter that enclosed Mack's answers to
11 GMAC's second set of interrogatories.

12 Mr. Garber, what is your objection to that?

13 MR. GARBER: It would be the same thing. It's my
14 cover letter to Mr. Lewis, and I have no objection to the
15 answers to interrogatories. I think they're quite appropriate
16 to --

17 THE COURT: Okay.

18 MR. GARBER: -- introduce, but my cover letter is --

19 THE COURT: Okay.

20 MR. GARBER: -- again, hearsay and may contain
21 impressions and thoughts of counsel, which are not at issue.

22 THE COURT: Mr. Lewis, what is your response to that?

23 MR. LEWIS: It's the same thing, Your Honor. It's not
24 hearsay.

25 THE COURT: All right. The objection is overruled.

1 All right. Now, let's go to the plaintiffs' exhibits.
2 And Mr. Lewis, let me go through, in order, the purged loan
3 that's Exhibit 1. What's your objection?

4 MR. LEWIS: Well, Your Honor, the purged loan notes
5 are maybe eight pages long, and I don't object to the
6 introduction of appropriate passages that are relevant to the
7 proceedings. But I want to reserve my right -- because I don't
8 know which portions of the purged loan notes counsel wants to
9 use at trial.

10 THE COURT: All right. I'm going to overrule the
11 objection. It provides background. If, during trial, there
12 are specific -- I mean, if there were -- my whole purpose in
13 requiring you to give me your objections, it doesn't help me at
14 all whatsoever when an exhibit's attached, and I don't what
15 portion of it, if any, you're objecting to. A lot of it -- as
16 we go through some of these things, you'll see a lot of the
17 exhibits you've objected to, Mr. Lewis, I just view it as
18 background. I don't really -- some of your objections were on
19 relevance, and I -- I mean, I think it's just useful background
20 to the case. How I'll weigh it, why it's being given, is a
21 whole other issue.

22 With respect to Exhibit 1, the objection to Exhibit 1
23 is overruled.

24 Exhibit 3, the medical records from Mrs. Mack, you
25 reserved your right to object to specific entries. I don't

1 know what you're objecting to or not. I mean, that's why I --

2 MR. LEWIS: Well, Your Honor --

3 THE COURT: -- require objections in advance so I can
4 try and get this resolved so you all know what's going to come
5 in and what's not going to come in at trial.

6 MR. LEWIS: Your Honor, here's the issue as I saw it.
7 What this trial is about is the QWR -- the alleged QWR and what
8 damages flowed from GMACM's alleged failure to respond to the
9 QWR. I don't know which of these medical records Mr. Garber
10 plans to try to tie to that specific issue. I have no way of
11 really objecting in advance because I don't know what he's
12 going to use out of these medical records.

13 THE COURT: All right. I'm going to --

14 MR. LEWIS: That's --

15 THE COURT: -- overrule the objection. Again, I think
16 it provides background as it relates to possible emotional
17 distress damages.

18 You're absolutely correct, Mr. Lewis, that what's in
19 this case is the QWR and the alleged failure to respond. I
20 think you've made a point in past hearings, Mr. Lewis, of
21 talking about Mrs. Mack's serious medical and mental health
22 issues that date back considerably before the events relating
23 to the foreclosure. So that's all clearly going to come in
24 anyway. I think I'm perfectly able to keep in mind what might
25 be relevant to damages and what goes to her condition, which I

1 think certainly has to be taken into account.

2 I think I've euphemistically referred to this before
3 as the eggshell head case, where, from first-year torts, where
4 you take the plaintiff as you find it. But certainly, what her
5 prior condition is may well be relevant to how the issue's
6 resolved. So I'm overruling the objection to Exhibit 3.

7 We've talked about Exhibit 4, the depositions, so I
8 don't -- we're not doing any more with that.

9 Exhibit 11, the Conrad deposition: there was no
10 deposition.

11 Mr. Garber, tell me what Exhibit 15 -- it's a subpoena
12 duces tecum and aide of execution to Deutsche Bank; it's dated
13 June 8th, 2011. What's the relevance of a subpoena duces tecum
14 to Deutsche Bank?

15 MR. GARBER: It shows knowledge of Deutsche Bank, and
16 it also shows efforts to collect this judgment. I think we're
17 talking mainly background there, but that's true for that
18 exhibit -- well, we'll take it in order. 15 shows the date of
19 knowledge of Deutsche Bank.

20 THE COURT: All right. The objection to Exhibit 15 is
21 sustained.

22 Why don't you cover Exhibit 22, the subpoena to GMAC,
23 dated June 8th, 2011? What's the offer for?

24 MR. GARBER: Your Honor, on 22, again, that's shows
25 knowledge of GMAC. They had claimed that they had no knowledge

1 of these proceedings, but it shows that definitely, as of the
2 date of service of this deposition, GMAC was in this matter.
3 and this --

4 THE COURT: Okay.

5 MR. GARBER: -- was a deposition in aide of execution.
6 So they knew of the judgment.

7 THE COURT: Mr. Lewis?

8 MR. LEWIS: Your Honor, I think we've stipulated to
9 that fact in the stipulations -- stipulated facts, as we did,
10 incidentally, Your Honor, to much of the medical history that I
11 wanted to call the Court's attention to shows up in the
12 stipulated facts.

13 THE COURT: All right. The objection to --

14 MR. LEWIS: I'm not going to be introducing any --

15 THE COURT: -- Exhibit 22 is overruled.

16 Let's come back to Exhibit 20, the affidavit of
17 Renaldo Reyes. This is the twenty-one-year-old vice president
18 of Deutsche Bank. I guess you can get to be a vice president
19 pretty quickly. I looked at that this morning. It refers to
20 pages of the pooling and service agreement, I think. I mean,
21 I -- what's your objection to it, Mr. Lewis?

22 MR. LEWIS: I don't --

23 THE COURT: I mean, the contents of the --

24 MR. LEWIS: -- I don't understand the --

25 THE COURT: -- the contents of the affidavit itself is

1 like basically nothing there. I mean --

2 MR. LEWIS: Yeah, I just don't understand the
3 relevance. It's not harmful to me. I just -- I'm trying to
4 keep the scope of the trial and the time we spend down to a
5 dull roar. And a lot of this material, to which I don't object
6 in principle in terms of whether it's harmful, is just totally
7 irrelevant.

8 THE COURT: All right. Let's deal with -- before I
9 tell you a ruling on that -- I mean, 30, 31, 35, 36 -- 30 is
10 the pooling and servicing agreement; 31 is a prospectus for
11 RALI 2007 QS3 Trust; 35 is the master servicing agreement; 36
12 is a contract between Deutsche Bank and GMAC.

13 What's your objection to those, Mr. Lewis?

14 MR. LEWIS: Same thing, Your Honor: relevance. I
15 mean, we stipulated the facts about the -- that these loans
16 were made, and so on. And I don't understand what we need the
17 servicing agreement for, or anything else like that.

18 THE COURT: Okay.

19 MR. LEWIS: I just --

20 THE COURT: The objections to 30, 31, 35 and 36 are
21 overruled. It's relevant background.

22 It also -- I mean, the PSA and the master servicing
23 agreement, they define what the servicer's supposed to do, and
24 I think it's useful. It's relevant background to the dispute.

25 Now, let's deal with 33: Deutsche Bank's objection to

1 entry of final order. What's your objection to that, Mr.
2 Lewis?

3 MR. LEWIS: Same thing, Your Honor: I don't
4 understand the relevance of it.

5 THE COURT: What's the relevance of --

6 MR. LEWIS: The objection --

7 THE COURT: -- 33, Mr. Lewis?

8 MR. LEWIS: Did you mean to ask that of Mr. Garber?

9 THE COURT: I mean -- I'm sorry; I mean Mr. Garber.
10 What's the relevance of 33, Mr. Garber?

11 MR. GARBER: 33 or -- oh, okay, 33.

12 THE COURT: 33: Deutsche Bank's --

13 MR. GARBER: I'm sorry.

14 THE COURT: -- objection to entry of final order.

15 MR. GARBER: Your Honor, one of the arguments that Mr.
16 Lewis has raised -- one of the dissents that he's raised
17 preliminarily is a motion that I filed -- a memorandum of law
18 that I filed in the suit in Florida. And that memorandum of
19 law was in response to this particular document that was filed
20 by GMAC. And so it's context for my argument.

21 I don't know that this is a very important exhibit.

22 THE COURT: All right. The objection to 33 is
23 sustained.

24 Mr. Lewis, what's the basis for your objection to 34,
25 the October 7th, 2009 letter from the Macks to GMAC?

1 MR. LEWIS: Your Honor, 34, 37 and 38, in my view, are
2 all issues of relevance. The issue here is the 2605(e) letter.
3 Was there a response to it and what the aftermath was. The
4 question of what other communications there were between the
5 parties is not before the Court, in my view, in this trial.
6 And I have the impression that counsel is trying to sort of
7 create a mass of evidence that will be subtly imported into
8 some kind of award, not just for a failure to respond to the
9 2605(e) issue, if there is a liability on that, but for the
10 whole foreclosure fiasco. It's like we're trying this one
11 again.

12 THE COURT: All right. The objections to 34, 37 and
13 38 are overruled. I view it as background.

14 What about 39, Mr. Lewis? 39 --

15 MR. LEWIS: It's the same thing, Your --

16 THE COURT: -- 40 and 41, those are all letters from
17 GMAC to the Macks.

18 MR. LEWIS: Yeah, it's all the same. It's all the
19 same issue.

20 THE COURT: All right. The objections to 39, 40 and
21 41 are likewise overruled.

22 Let me just go back over with you my rulings to make
23 sure we're all on the same page. Mr. Garber's objections to
24 Exhibits J and P are overruled. Mr. Lewis' objections to
25 Exhibits 1 and 3 are overruled. We talked about the

1 depositions, and Mr. Garber's indicated he's not offering them
2 as part of his case-in-chief except for the Cheryl Mack
3 deposition, where I've overruled the objection, but not as
4 to -- I'm going to give you a chance, Mr. Lewis, if there are
5 specific page and line references as to which you object. I'll
6 permit you to do that.

7 Conrad's not an issue. Objection to 15 and 20 are
8 sustained; objection to 22 is overruled. The objections to 30,
9 31 are overruled. The objection to 33 is sustained. The
10 objections to 34, 35, 36, 37, 38, 39, 40 and 41 are all
11 overruled.

12 What we didn't talk about is Mr. Garber's Exhibit 27,
13 which is the answer to the complaint in the state court action.

14 Mr. Lewis, what's your objection?

15 MR. LEWIS: Your Honor, 27 is broader than the answer.
16 The answer is one of my exhibits as well. We're talking about
17 everything that followed, all the post-answer pleadings and
18 filings and the like that Mr. Garber duly sent to Mr. Stern's
19 office. And I think it's essentially the same issue as 15 and
20 the other subpoena -- 15 and 22. I just don't see the
21 relevance. It's like we're retrying, once again, what GMAC and
22 Deutsche Bank knew and when they knew it. That's not relevant,
23 in my view, to the 2605(e) issue that we have now.

24 THE COURT: Mr. Garber, do you want to respond?

25 MR. GARBER: I understand his objection, and I agree

1 in part with it. And I would say to the Court I really don't
2 intend to introduce these into evidence. They're there
3 possibly for rebuttal.

4 THE COURT: All right. Since you just --

5 MR. GARBER: But no, I don't intend to introduce them
6 as evidence.

7 THE COURT: Since you've just told me that you don't
8 intend to offer them in evidence, I don't need to rule.

9 MR. GARBER: Yes, Your Honor, I don't intend to offer
10 them into evidence, but I may use them for rebuttal or
11 impeachment.

12 THE COURT: If you seek to use them for rebuttal or
13 impeachment, I'll rule on them at -- if they're offered, I'll
14 rule on it at that time. Okay.

15 MR. GARBER: Okay. Yes, Your Honor.

16 THE COURT: So I think I've covered all of the
17 objections that you've - that has been asserted to exhibits at
18 this point.

19 Either of you think I've left something out?

20 MR. LEWIS: No, Your Honor.

21 MR. GARBER: No, Your Honor, I don't think so.

22 I do have a question or two about trial when you get
23 to that point.

24 THE COURT: I think we're there, Mr. Mack -- Mr.
25 Garber.

1 MR. GARBER: Okay. A couple of observations or
2 questions that I would have. Number one, when would the trial
3 be? And number two, I'm going to be getting Mr. Mack in New
4 York, and he's elderly. And it's hard for him to get around.
5 Would it be possible that we could start trial each day at 10
6 o'clock instead of 9?

7 THE COURT: Well, let me ask you. How long do the two
8 of you estimate trial will last?

9 MR. LEWIS: Your Honor, it's Mr. Lewis. I can't
10 imagine it's going to last more than two days. There's not
11 really -- most of the record is stipulated, and the actual
12 introduction of evidence -- I don't know how long Mr. Mack's
13 examination will take. I don't know how long the deposition video
14 of Mrs. Mack is. Those are the things that are going to take
15 time on Mr. Garber's side.

16 Mr. Cunningham -- and my cross-examinations insofar as
17 that's possible. Mr. Cunningham, my witness, is probably --
18 from my point of view, is probably not going to take more than
19 an hour. I don't know how long cross and redirect will take,
20 but I just can't imagine this will last more than two days.
21 And I'd be more than willing to accommodate Mr. Garber and Mr.
22 Mack with a 10 o'clock start, if that suits the Court.

23 THE COURT: I'm prepared to do that. I appreciate
24 your willingness to do that, Mr. Lewis. I get concerned when a
25 trial's going to go for a week or something like that. If

1 we're talking about a couple of days, I'm certainly prepared to
2 start it at 10.

3 How old is Mr. Mack, Mr. Garber?

4 MR. GARBER: I think he's eighty-one.

5 THE COURT: Oh, okay. All right.

6 So now we need to talk about when the trial will be.

7 MR. LEWIS: Your Honor, it's Mr. Lewis. Let me begin
8 this part of the discussion with kind of a bottom line from my
9 side of things. Given the schedule of me and -- my schedule
10 and Ms. Hiensch's schedule and Mr. Cunningham's schedule --
11 he's expecting a baby in -- around about April 24th and had
12 planned to take a couple of weeks off for paternal leave, and
13 I'd like to accommodate him if I can. And given my other
14 commitments between now and then, frankly, my sche -- if you
15 consider not just the trial days, but the time it takes to
16 prepare for trial, where I will have to be in New York, we're
17 probably talking about a week of my time -- it will be
18 difficult for me to try this case before roughly the middle of
19 May.

20 And as the Court knows, I've been anxious to get this
21 case decided sooner than later. So this is not something that
22 I -- that I'm mentioning lightly. But that would be my
23 preference. If that doesn't suit the Court, I'll do what I can
24 to move stuff around to whatever dates the Court does decide.
25 But I would like to ask that we schedule this for the middle of

1 May, thereabouts.

2 THE COURT: I'll tell you both right now that the
3 middle of May -- May is a very -- May isn't going to work, so
4 we're really talking about, I think, realistically, in June. I
5 have two trips out of the country scheduled in May.

6 MR. LEWIS: June is fine with me, Your Honor. I hope
7 one of them is to Morocco.

8 THE COURT: No, one of them is actually to Istanbul.

9 MR. LEWIS: Oh, you're going to love that, if you
10 haven't been there before.

11 THE COURT: Well, I'm actually to teach judges from
12 Iraq.

13 MR. LEWIS: Oh, wow.

14 THE COURT: Actually, they're bringing them to
15 Istanbul rather than asking --

16 MR. LEWIS: Um-hum.

17 THE COURT: -- people to go to Iraq to do the --

18 MR. LEWIS: Yeah.

19 THE COURT: -- class.

20 MR. LEWIS: Istanbul is a wonderful city.

21 THE COURT: Let me --

22 MR. LEWIS: Sometime in June, Your Honor, is fine with
23 me, whatever the --

24 THE COURT: What's your schedule --

25 MR. LEWIS: -- Court --

1 THE COURT: -- in June, Mr. Garber?

2 MR. GARBER: Your Honor, I can do it virtually any
3 time in June. I think I have a hearing -- it's a fairly
4 important hearing. I don't know if the Court would let me out
5 of that. It's in the middle of June sometime.

6 THE COURT: Do you know what the date is?

7 MR. GARBER: I'm looking through my book, and I'm not
8 seeing it.

9 THE COURT: Look, We're scheduling this far enough in
10 advance, I'm not going to interfere with a pre-existing
11 commitment of yours.

12 MR. GARBER: Okay. I am actually not seeing it here
13 in my book, but I know it's scheduled sometime in June.

14 Your Honor, for the record, I'm happy to accommodate
15 the Court and Mr. Lewis in any way possible. We would be ready
16 to go to trial in the latter part of March through the first
17 part of April. I am scheduled to be on vacation -- I have
18 tickets already for April 21st through May 5th. But other than
19 that, I will -- whatever I have in my schedule, I will change
20 to meet the convenience of the Court and Mr. Lewis.

21 MR. LEWIS: I'm completely open in June, Your Honor.
22 I don't have a single known commitment at the moment.

23 (Pause)

24 THE COURT: Could we schedule it for Wednesday, June
25 10th and Thursday, June 11th?

1 MR. LEWIS: Works fine for me, Your Honor.

2 THE COURT: Mr. Garber?

3 MR. GARBER: Your Honor, that's fine with me.

4 THE COURT: All right. Let's do it those days, and
5 we'll start at 10 o'clock.

6 What -- let me ask this. With respect to Mrs. Mack's
7 deposition, it would be my preference, absent an objection, Mr.
8 Lewis, is for me to watch and listen to the video in advance of
9 the trial. I'd rather not take the time to do it in the
10 courtroom. But with that preference stated, if you would
11 prefer that I not view it in advance, that's fine. I'm not --

12 MR. LEWIS: No, Your Honor, I wouldn't prefer that.
13 What I would appreciate is, if that's going to happen, that I'd
14 be provided a copy in advance as well.

15 THE COURT: Oh, absolutely. Absolutely. So we have
16 the transcript but --

17 MR. LEWIS: So that --

18 THE COURT: -- and I need -- give me a date, Mr.
19 Lewis -- we've got enough time here that -- give me a date by
20 which you will give the Court and Mr. Garber objections to
21 specific page and line numbers in the Cheryl Mack deposition
22 transcript? Because there's no jury, the video itself does not
23 need to be redacted if -- I can -- if I exclude portions of it,
24 I'll exclude portions of it. The fact that I may have it
25 running continuously on a computer or something, I'll know what

1 I excluded.

2 But how much do you want, Mr. Lewis -- there's plenty
3 of time, so I'm not trying to jam you up with that. But I
4 think you want to get --

5 MR. LEWIS: Your Honor --

6 THE COURT: -- Mr. Garber your specific --

7 MR. LEWIS: -- I don't --

8 THE COURT: -- objections are, and he can respond to
9 it in writing.

10 MR. LEWIS: Yeah. So here's what I would like to do,
11 Your Honor, if this works. I'd like to have Mr. Garber send me
12 a copy of the video so I can watch it before I prepare my
13 objections.

14 THE COURT: Okay.

15 MR. LEWIS: I don't know that it matters, but it
16 might, and I'd like to see what you're seeing.

17 The second thing is I -- once I have it, it probably
18 won't take me more than a couple of weeks, max, to put together
19 my objections, if that. So I guess, from my perspective, I can
20 commit to have those objections to you, Your Honor, within two
21 weeks of seeing the video.

22 THE COURT: Are you able to send Mr. Lewis the video
23 at this point, Mr. Garber?

24 MR. GARBER: No, Your Honor, not at this point. We
25 have them out at the videographer for copy, and I'm

1 anticipating them any day now that I'll --

2 THE COURT: Okay.

3 MR. GARBER: -- have them back.

4 THE COURT: Look, why don't the two of you talk and
5 just confirm in a letter to me what you've agreed to on that
6 schedule. I'm -- we have enough time here.

7 MR. LEWIS: Very well, Your Honor.

8 THE COURT: The two of you have worked well enough
9 together that I'm sure you'll get this resolved. Okay?

10 MR. LEWIS: I'm sure we can.

11 MR. GARBER: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. LEWIS: Your Honor, do you want my objections in
14 the form of a pleading or just a letter or what?

15 THE COURT: You can put them in a letter, but just put
16 it on the docket so they're -- it doesn't have to -- you
17 can -- either way. I'm perfectly fine looking at in the
18 letter. Okay?

19 MR. LEWIS: Okay. Thank you, Your Honor.

20 THE COURT: Did the two of you try and mediate this
21 dispute?

22 MR. LEWIS: No, Your Honor, we didn't. We're very far
23 apart.

24 THE COURT: Okay.

25 MR. LEWIS: And we agreed that being as far apart as

1 we were, it was unlikely that a mediation would produce
2 anything. We have very different views of what's at issue,
3 what the evidence will show, what the evidence can show, and we
4 sort of agreed that, after talking with each other at some
5 length, that we thought it would just be futile because there's
6 not even the beginnings of a bridge.

7 THE COURT: Okay.

8 MR. LEWIS: That may change, but as Mr. Garber is, I'm
9 always willing to talk settlement or some other method of
10 resolving the dispute, but it has not looked very promising.

11 THE COURT: Okay. I'm not going to press you further
12 on it. Mediation only works if -- look, you're both really
13 experienced lawyers and you know the facts of this so
14 it's -- okay. Let me think whether there's anything else.

15 So then, let me just cover basics of how I conduct
16 trials.

17 I'm not -- given we have a limited number of witnesses
18 and limited number of exhibits, you can each do an opening;
19 obviously, Mr. Garber first, Mr. Lewis second. I would
20 like -- I guess what I ought to do is I ought to -- I have a
21 template for a procedures for trial order and I'll make sure I
22 get one entered. But basically -- usually I do timed trials,
23 but given that there are a limited number of witnesses I'm not
24 going to do that at this point. Much of the -- a lot of the
25 evidence is documentary. But I'll hear openings from each of

1 you and then Mr. Garber call your first witness, Mr. Mack, and
2 then we'll have cross-examination.

3 Mr. Lewis, you've got one witness as I understand it?

4 MR. LEWIS: That's correct, Your Honor.

5 THE COURT: Okay. And the same. And if you have
6 rebuttal -- the issue about rebuttal, Mr. Garber, for me, it
7 has to be true rebuttal. So don't hold back anything that you
8 think you want to put in as part of your case-in-chief. I
9 certainly permit rebuttal if it's, in fact, rebuttal.

10 And then we'll have closings. But I do want pre-trial
11 memoranda of law and what I'd like to see is each side set out
12 their elements of the claims and defenses and just a brief
13 summary of what evidence you believe. I don't want to -- I'll
14 hear the evidence so, you know what, I don't expect you to
15 repeat all that, but you need to set forth the elements of your
16 claim, Mr. Garber.

17 One of the issues that we've had some discussion in
18 prior hearings about, and I think either the last telephone
19 hearing or the one -- maybe when you were here you told me
20 you'd found a case on this and this is the point about can
21 there be liability where the loan servicer's time to respond,
22 or QWR, has not yet run. I think you told me you found a case
23 on that. So --

24 MR. GARBER: Yes, Your Honor, I did.

25 THE COURT: And obviously, Mr. Lewis has raised the

1 issue about where the letter was sent, that it was not sent to
2 the address indicated in communications from GMAC as to where
3 the letter had to go. That, obviously, is an issue so -- I
4 mean, I expect you to address the elements of the claims and
5 defenses. And given that the trial is this far away, I think
6 I'd like to have it two weeks before the trial date, each of
7 you, simultaneous filings. I don't want -- so you'll both just
8 do it once. And I'll probably give you a chance -- well, after
9 I hear the evidence, I'll decide whether I want closing briefs.

10 I usually require closing memoranda unless I really
11 feel that the pre-trial legal memoranda cover the main issues.
12 Any questions either of you have?

13 MR. LEWIS: No, Your Honor.

14 MR. GARBER: Yes, Your Honor, I do have one.

15 THE COURT: Sure.

16 MR. GARBER: I was under the understanding that I had
17 to list all of the documents in evidence that I would -- might
18 rely on at trial, but that doesn't necessarily mean that I
19 intend to introduce it, just that I have the ability to
20 introduce these things.

21 I intend to pare down the documents. We've sent up
22 copies of all these things to the Court, and I understand from
23 my associate that it was quite voluminous; I think a banker box
24 or something. I don't intend to introduce a banker box. I'm
25 going to introduce maybe a hundred pages. I think that

1 probably will be all. But would it be possible that I can rely
2 on the documents that I've already sent to the Court and not
3 have to bring multiple copies up with me?

4 THE COURT: Yes, it would be. But you need to -- hang
5 on just one second. Yes, you've got them pre-marked; that's
6 fine. I don't need them again; we have them.

7 Hang on a second.

8 Oh, we actually only have the ones you objected to, so
9 we don't have all the exhibits.

10 MR. GARBER: Okay, yes, sir.

11 MR. LEWIS: The Court had told --

12 THE COURT: Okay. But, look, Mr. Garber you -- Mr.
13 Garber, you have on your exhibit list, you've got forty-two
14 exhibits.

15 MR. GARBER: Yes.

16 THE COURT: I haven't seen what the volume of that is,
17 but I think the last trial I had -- it went on a couple of
18 weeks -- but I had about 400 exhibits from one side and I get
19 much more concerned about when I got all those exhibits. So
20 just make sure we get all of the exhibits that you've pre-
21 marked.

22 There aren't -- forty-two exhibits is not that many
23 exhibits, and Mr. Lewis has A through W. So that's not -- even
24 fewer. I would consider, if you conclude in advance, Mr.
25 Garber, that you know there are certain exhibits you're not

1 going to be introducing, please tell Mr. Lewis that, and I
2 expect him to do the same thing. I just -- it's just -- it
3 speeds the process up and makes life easier for both of you if
4 you know what exhibits are coming in. I'm not too concerned
5 given the number of exhibits that are identified. This is not
6 the needle in the haystack routine. Okay?

7 Why don't the two of you talk and see if you can iron out
8 any other ground rules as between you. Okay?

9 MR. LEWIS: Your Honor, we are --

10 MR. GARBER: Your Honor, may I --

11 THE COURT: Go ahead, Mr. Garber.

12 MR. LEWIS: Your law clerk had indicated that you
13 wanted the pre-marked exhibits a week in advance of the trial.
14 Does that still stand or --

15 THE COURT: That still stands. That still stands.

16 MR. LEWIS: Okay.

17 THE COURT: Because it enables us to --

18 MR. LEWIS: Well, I can certainly provide them sooner.

19 THE COURT: No, that's fine, because it enables us to
20 get organized here in terms of getting -- because I put all of
21 the exhibits for both sides in the court -- by my bench and I'm
22 organized so I can find things.

23 MR. GARBER: Your Honor, when we get to trial, there
24 will be a certain amount of trial strategy and that sort of
25 thing that hasn't been finalized on my part, maybe not on Mr.

1 Lewis' part. I intend to notify Mr. Lewis of exactly those
2 documents that I intend to introduce, but I would request that
3 the Court not restrict me and if I choose not to introduce them
4 after listening to his opening statement, I hope the Court
5 would accommodate me on that.

6 THE COURT: I never get upset when people don't offer
7 exhibits.

8 MR. GARBER: Okay.

9 THE COURT: The only time I get concerned is when
10 somebody has come up with a proposed exhibit list of hundreds
11 of documents which everybody knows they have no intention of
12 offering and it's the hiding the needle in the haystack.
13 That's not what -- when I look at your exhibit list, Mr.
14 Garber, that's not my concern, okay. So don't feel compelled
15 to offer any exhibits that you conclude, based on trial
16 strategy or how things are going, you don't need to put into
17 evidence. Okay. This is --

18 MR. GARBER: Okay. Thank you, Your Honor.

19 THE COURT: Neither of you has tried to put the needle
20 in the haystack and find it; it's there. Okay.

21 MR. GARBER: Yes.

22 THE COURT: Any other questions, Mr. Garber?

23 MR. GARBER: No, Your Honor.

24 THE COURT: Mr. Lewis?

25 MR. LEWIS: No, Your Honor. Thank you.

1 THE COURT: All right. Thank you, very much, both of
2 you. Okay. We're adjourned.

3 MR. LEWIS: Thank you, Your Honor.

4 MR. GARBER: Thank you, very much, Your Honor.

5 (Whereupon these proceedings were concluded at 10:57 AM)

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C E R T I F I C A T I O N

I, Aliza Chodoff, certify that the foregoing transcript is a true and accurate record of the proceedings.



ALIZA CHODOFF

AAERT Certified Electronic Transcriber CET**D-634

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